~~07138~~
33444

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

PAUL S. DETCH,
Petitioner,

v. Case No.

THE HONORABLE JAMES J. ROWE,
Respondent.

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF PROHIBITION AND APPEAL OF SANCTIONS

Petitioner filed a Petition for Writ of Prohibition and Appeal of Sanctions, requesting this Court to issue a Writ of Prohibition against Respondent to prevent him from retrying the case against Petitioner's client and to overturn the assessment of court costs against Petitioner. Now comes Respondent with this Response.

Factual and Procedural History

Petitioner, Paul S. Detch, represented the defendant in the case State of West Virginia v. Terron Godfrey.[1] Mr. Godfrey was charged with sexual assault in the third degree. The trial began on January 10, 2007. Respondent was the presiding judge. The jury was empanelled, opening statements were made and testimony began. Prior to the jury returning on the second day of the trial, January 11, 2007, the parties argued over the admissibility of certain defense witnesses who had not been disclosed to the State prior to trial. Following a lengthy colloquy on the record between Judge Rowe and Mr. Detch, it became painfully clear that Mr. Detch was ill-prepared to proceed with the trial.

Mr. Detch admitted on the record that he had not interviewed any of the State's witnesses prior to trial and that he had essentially ignored the State's discovery requests. He told Judge Rowe, "The State responded with a [discovery] request, and to be quite frank, had a bunch

[1] Greenbrier County Circuit Court, Case Number 06-F-101.

of things with experts and I, to be quite frank, kind of overlooked it." (T.R. January 11, 2007, P. 4). He argued that he had no obligation to comply with the State's discovery request unless the State complied with his. (*Id.* at P. 5). Yet, he never filed a motion to compel discovery and never once complained that the State had not complied with discovery until the morning of the second day of trial. Even then, his only argument was that the State had provided an incomplete address of the alleged victim. This argument was irrelevant, as Mr. Detch admitted that he never even attempted to interview her and did not even discover that the address was inaccurate until the witness testified on the first day of trial. (*Id.* at P. 6). Furthermore, Judge Rowe specifically asked if the State had actively prevented him from interviewing the alleged victim, and Mr. Detch admitted that they had not. Specifically, Judge Rowe asked, "[D]id the State prevent you from interviewing this young lady, [the alleged victim]?" (*Id.* at P. 16). Mr. Detch replied, "No, I didn't make any attempt to particularly do it..." (*Id.*). Not only did Mr. Detch fail to interview the alleged victim prior to trial, he admitted that he had not even interviewed his own witnesses until the day of the trial. (*Id.* at P. 10).

Mr. Detch did not provide a witness list to the State but was planning on calling at least three witnesses in addition to the defendant. He argued that he had no obligation to disclose these witnesses because they were only being called as rebuttal witnesses to impeach the alleged victim's testimony. (*Id.* at P. 8-9). This is simply inaccurate.

The Defendant was charged with sexual assault in the third degree, pursuant to West Virginia Code Section 61-8B-5(a)(2), for engaging in sexual intercourse with a person less than sixteen years of age. Pursuant to West Virginia Code Section 61-8B-12(a), it is an affirmative defense to this crime if the Defendant did not know that the victim was under the age of sixteen. Mr. Detch planned on using this affirmative defense. He admitted in his opening statement and

throughout the trial that the Defendant had in fact engaged in sexual intercourse with the alleged victim but that he reasonably thought she was over sixteen at the time. His three witnesses were to testify exactly to this fact; that the alleged victim had told them that she was over the age of sixteen prior to the act. Certainly this testimony would have conflicted with the alleged victim's, but it was simply *not* rebuttal testimony. It was testimony to support the Defendant's affirmative defense, and as such was part of Defendant's case in chief. Those witnesses must be disclosed to the State prior to trial. Even supposing these witnesses were rebuttal witnesses to impeach the alleged victim's testimony, Judge Rowe accurately stated that it is impermissible to impeach with extrinsic evidence.

Mr. Detch argued that the State knew that he intended to call the witnesses because he had issued subpoenas against them. However, the State said they never received a subpoena list and Mr. Detch said, "I thought my secretary delivered it[.]" (*Id.* at P. 18). Upon examination of the record, it clearly showed that Defendant's subpoena list had not been served upon the State, and Judge Rowe noted this on the record. (*Id.*).

After the lengthy discussions on the record, Judge Rowe was justifiably convinced that Mr. Detch had not properly prepared for trial. Judge Rowe found that the Defendant was receiving ineffective assistance of counsel from Mr. Detch. Because of this finding, Judge Rowe could not allow the trial to proceed and he declared a mistrial. (*Id.* at P. 27-28). Specifically, Judge Rowe stated:

> As I understand your argument and what you have represented today, you have not properly prepared your case and I am going to declare a mistrial, because to let this proceed, at this point, I think you would be – have rendered ineffective assistance of counsel to your client. I'm going to assess the cost of this trial against the defense and declare a mistrial because, obviously, you didn't do your job. And for me to allow this case to proceed we'd be looking at another habeas. So, a mistrial is declared. I'm sorry. We can retry this. (*Id.*)

Mr. Detch now requests this Court to issue a Writ of Prohibition against Judge Rowe to prevent him from assessing court costs against him or from retrying the case against the Defendant. He argues that a retrial would amount to double jeopardy to his client and that assessing court costs against him was improper.

Applicable Law

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.
>
> Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)

"Termination of a criminal trial arising from a manifest necessity will not result in double jeopardy barring a retrial." Syl. Pt. 4, *Keller v. Ferguson*, 177 W.Va. 616, 355 S.E.2d 405 (1987). "The term 'manifest necessity' covers a broad spectrum of situations which in some instances bear little relationship to the literal meaning of this phrase." *Id.* at 620, 409. "Where the circumstances which force a trial court to declare a mistrial are unforeseeable and make the completion of the trial impossible, a manifest necessity will be found to exist and double jeopardy will not be found to bar retrial." *State v. Gibson*, 181 W.Va. 747, 384 S.E.2d 358 (1989).

When a defense attorney is found to have rendered ineffective assistance of counsel, this Court has commonly allowed the case to be retried without a violation of double jeopardy. A

good example of such a case is this Court's very recent decision in *State, ex rel. Humphries v. McBride*, WL 1201056 (Decided on April 19, 2007). In *Humphries*, the defendant filed a habeas corpus petition alleging ineffective assistance of counsel following his murder conviction. This Court determined that the defendant had received ineffective assistance of counsel and remanded the matter for retrial. There was no mention of double jeopardy worries. Perhaps not coincidentally, Mr. Detch served as defense counsel in that case as well. As stated, this Court found him to be ineffective in that case as Judge Rowe did in the present case.

"A court 'has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.' 14 Am. Juris., Courts, section 171." Syl. Pt. 1, *State ex rel. Rees v. Hatcher*, 214 W.Va. 746, 591 S.E.2d 304 (2003)(*per curiam*).

> Before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct.
>
> *Id.* at Syl. Pt. 2.
>
> In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.
>
> *Id.* at Syl. Pt. 3.

In *Rees, supra*, the trial judge continued the trial and assessed court costs against the defense attorney after the defendant complained to the court that his attorney was not prepared. This Court overturned the trial judge's assessment of court costs on the basis that the defense

attorney was denied due process because he did not have the opportunity to explain his actions. This Court applauded the judge's desire to run an efficient courtroom and his efforts to protect the rights of criminal defendants. *Id.* at 757, 308. However, this Court noted, "in [his] zeal to protect the defendant's rights, [the judge] failed to provide [defense counsel] with an opportunity to explain his actions." *Id.*

Argument

Mr. Detch's argument that a retrial of his client would amount to double jeopardy is baseless. Retrial is common following a mistrial so long as the mistrial was not the result of prosecutorial misconduct or intent. The law clearly allows for retrial of a criminal defendant if a mistrial has been declared because of "manifest necessity." In this case, Judge Rowe performed a lengthy colloquy with Mr. Detch on the record regarding his trial preparation (or lack thereof). This resulted in Judge Rowe finding that Mr. Detch had not properly prepared for trial and, therefore, was providing ineffective assistance of counsel. A review of the transcript shows that Judge Rowe was justified in making such a finding. In light of this determination, completion of the trial was impossible and declaring a mistrial was manifestly necessary. Under such circumstances, double jeopardy does not prevent a retrial.

Mr. Detch's argument regarding court costs is also wrong. Though this case is similar to *Rees v. Hatcher, supra*, it is not identical. The Court in *Rees* prevented the trial judge from assessing court costs against the defense attorney but only because the attorney in that case was not provided the opportunity to explain his lack of preparation. In the present case, as shown in the transcript, Judge Rowe provided Mr. Detch with ample opportunity to explain his actions before declaring a mistrial and assessing costs. Mr. Detch's explanations only served to buttress Judge Rowe's suspicion that he was not prepared for trial. Because Mr. Detch was afforded the

opportunity to explain his actions, and Judge Rowe found such explanations inadequate, assessing court costs against him was completely proper. In fact, assessing costs to any other party in this case would be the true injustice.

But for Mr. Detch's conduct, the trial would have gone forward to completion and court costs assessed in their typical manner. Judge Rowe was prepared and ready to go forward. The State was prepared and ready to go forward. The jury had already heard one day of testimony and was ready to go forward. Mr. Detch, on the other hand, was preparing his case as the trial progressed and, contrary to his assertions, was the sole reason the trial did not go forward to its completion. Accordingly, assessing court costs against him in this case was proper.

Conclusion

For all of the reasons stated above, a writ of prohibition should not be issued against Judge Rowe because his actions were appropriate and not clearly erroneous as a matter of law. Retrial of Mr. Detch's client would not violate double jeopardy. Assessment of court costs against Mr. Detch was within Judge Rowe's inherent power and was appropriate because Mr. Detch had ample opportunity to explain his actions.

Stephen R. Dolly
Greenbrier County Assistant Prosecutor
200 North Court Street
Lewisburg, WV 24901
(304) 647-6616
WV State Bar # 1035